DIVISION ONE
FILED: 11/27/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARTIN and CATHRYN HESS, husband and wife,	1 CA-CV 12-0097
	DEPARTMENT D
Plaintiffs/Appellants,	
	MEMORANDUM DECISION
v.	
	(Not for Publication –
BMO HARRIS BANK, N.A.,	(Rule 28, Arizona Rules of
	Civil Appellate Procedure)
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-050363

The Honorable Linda H. Miles, Judge

AFFIRMED

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K E S S L E R, Judge

¶1 Appellants Martin and Cathryn Hess ("the Hesses") appeal from the superior court's order granting Appellee BMO Harris Bank, N.A. ("the Bank") summary judgment. Because the Bank was entitled to judgment as a matter of law, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 We view the facts and the inferences arising from those facts in the light most favorable to the Hesses as the nonmoving party. *Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 506, ¶ 10, 269 P.3d 678, 682 (App. 2011). In 2005, the Hesses entered into a residential construction loan agreement ("First Contract") with the Bank to fund construction of a new house.[1] The First Contract provided that the Bank would disburse funds only as various stages of construction were completed. Almost two years after they entered into the First Contract, the Hesses learned that the builder abandoned the project after having completed only one-third of the construction of the house, but, nevertheless, the Bank had disbursed to the contractor the entire amount of the loan proceeds.

[1] The Hesses' entered into two construction loans and a loan modification with M&I Marshall and Ilsley Bank ("M&I"). During litigation, M&I merged with the Bank. The parties denominate the first construction loan as the First Contract; the second construction loan, which replaced the First Contract, as the "Second Contract"; and the loan modification as the "Third Contract." For consistency, we use these references as well.

¶3 To obtain additional funds to complete construction and avoid foreclosure, the Hesses entered into the Second Contract with the Bank in 2007, which increased the principal amount of the original loan and replaced the First Contract. The Hesses insist that if they had refused to borrow additional funds from the Bank, the Bank would have foreclosed on the property. Almost one year later, the Hesses entered into a loan modification (the Third Contract) that extended the term of the loan and reduced the Hesses' payments. The Hesses made no mention of the Third Contract in their complaint, but the Bank raised its existence in its motion for summary judgment as a defense to the Hesses' claims.

¶4 Approximately two years after the Hesses entered into the Third Contract, they unsuccessfully sought to refinance the loan with the Bank. The Hesses then reported the Bank to the Arizona Department of Financial Institutions and the Federal Deposit Insurance Corporation ("FDIC") and filed a complaint against the Bank. The Hesses alleged the Bank breached the First Contract by disbursing all of the loan proceeds even though the builder had completed only one-third of the construction. The Hesses further alleged that the Second Contract is voidable because it was entered into under duress. The Bank filed a motion for summary judgment claiming that when

the Hesses signed the Third Contract and continued to make payments according to its terms, they affirmed the Second Contract. The Bank further denied any breach of the First Contract, claiming that the Hesses failed to meet their obligations.

¶5 The superior court entered summary judgment in favor of the Bank. The Hesses timely appealed. We have jurisdiction pursuant Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).[2]

DISCUSSION

¶6 Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). "We determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Best Choice Fund*, 228 Ariz. at 506, ¶ 10, 269 P.3d at 682. We will affirm if the court was correct for any reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

[2] We cite to the most recent version of the statute when there are no relevant changes.

I. FIRST CONTRACT

¶7 The Hesses argue that the Bank breached the First Contract by prematurely disbursing all of the loan funds.[3] The superior court did not err in holding that the Hesses waived any alleged breach by the Bank when they entered into the Third Contract.

¶8 Because the Hesses had to borrow additional funds to complete the home, they had to have known of the Bank's alleged breach of the First Contract before entering into either the Second or Third Contract because all of the loan proceeds had been disbursed, but the house was not completed. Although the Hesses assert that they entered into the Second Contract under duress, they do not make the same claim with respect to the Third Contract, which reaffirmed the terms in the Second Contract. In fact, the Hesses make no mention of the Third Contract in their complaint or in their opening brief, but they address the waiver issue in their reply brief.

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[3] Because we hold that the Hesses waived their claim of breach of the First Contract, we need not reach the issue of whether the conclusory statements contained in the Hesses' affidavits are sufficient to avoid summary judgment on the breach of contract claim. *See Florez v. Sargeant,* 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("Self-serving assertions without factual support in the record will not defeat a motion for summary judgment." (citation omitted)).

¶9 To waive a breach of contract claim "there must be the relinquishment of a known right of conduct which would warrant an inference of an intentional relinquishment." *United California Bank v. Prudential Ins. Co. of America,* 140 Ariz. 238, 283, 681 P.2d 390, 435 (App. 1983). There must be an opportunity for one to choose between the relinquishment and the enforcement of the right in question. *Ariz. Title Guarantee & Trust Co. v. Modern Homes, Inc.*, 84 Ariz. 399, 402, 330 P.2d 113, 114 (1958). When an intention to waive is not expressed, a party's conduct must be such as to warrant the inference of such intention. *Id.* A party's "subjective, uncommunicated desires" are irrelevant in determining intent. *Spain v. Valley Forge Ins. Co.*, 152 Ariz. 189, 194, 731 P.2d 84, 89 (1986). Waiver can be inferred by a party's manifested objective intent. *See id.* (holding that insured's conduct manifested an objective intent to purchase uninsured motorist coverage regardless of subjective intent); *see also Wippman v. Rowe*, 24 Ariz. App. 522, 525, 540 P.2d 141, 144 (1975) (holding that in the case of rescission of a contract, "the subjective intent of the parties . . . is immaterial").

¶10 Six months after executing the Second Contract and with full knowledge of the Bank's alleged breach of the First Contract, the Hesses approached the Bank and asked for a loan

modification. Mrs. Hess requested the modification because the Hesses could not afford the payment, in part, because they were unable to sell their current house due to the collapse of the housing market, but not because of any bad act by the Bank. The Bank agreed and the parties entered into the Third Contract, which repeatedly and expressly reaffirmed the Second Contract. Because the Second Contract replaced the First Contract, by agreeing to the Third Contract the Hesses also implicitly reaffirmed the First Contract.

¶11 In fact, the record reflects that the Hesses never made any complaint against the Bank in connection with the First Contract until three years after the alleged breach, when the Bank declined the Hesses' request for another loan modification. Mrs. Hess acknowledges this fact in her affidavit. This was also the first time the Hesses reported the Bank to the Arizona Department of Financial Institutions and the FDIC. From all of the foregoing, we necessarily infer that by entering into the Third Contract, the Hesses made the choice to relinquish their right to assert the Bank's alleged breach of the First Contract.

¶12 The Hesses claim that because they did not know they had a right to file a lawsuit prior to entering into the Third Contract, there could be no knowing relinquishment on their part. First, neither of the Hesses attests to this fact in his

or her affidavit in order to create a genuine issue of material fact and thereby preclude summary judgment. *See State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981) (explaining that argument of counsel does not constitute evidence, but "sworn affidavits, stipulated facts, depositions, and oral testimony" are proper evidence in support of or in opposition to motions); *Bank of Yuma v. Arrow Constr. Co.*, 106 Ariz. 582, 585, 480 P.2d 338, 341 (1971) ("Allegations in pleadings are not evidence; they are statements of facts which the pleader must prove unless admitted by the opposing party.").

¶13 Furthermore, it is undisputed that the Hesses knew that the Bank had disbursed all of the funds even though construction had not been completed, which was contrary to the First Contract. The Hesses incorrectly claim that to have waived their breach of contract claim, they must have known the exact legal nature of their claim. All that is required for waiver, however, is knowledge of the essential facts that give rise to the claim, not the legal effect of those facts. Restatement (Second) of Contracts § 84 cmt. b. (1981) ("The common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights . . . it is

sufficient if he has reason to know the essential facts.") [4]; *see also Sw. Cotton Co. v. Valley Bank*, 26 Ariz. 559, 563, 227 P. 986, 988 (1924) (holding that waiver occurs when one who is in possession of a right and is "with full information of the material facts" acts inconsistently with that right (citation omitted)) *In re Estate of Cortez*, 226 Ariz. 207, 212, ¶ 8, 245 P.3d 892, 897 (App. 2010) (holding that the type of knowledge a party must have to intentionally waive a known right is knowledge that "one using reasonable care or diligence should have").

¶14 The waiver cases upon which the Hesses rely do not persuade us otherwise. In *DeTemple v. Southern Insurance Company,* the insured argued that by negotiating a late premium payment, the insurer waived the right to claim that there was no coverage for an automobile accident. 154 Ariz. 79, 81, 740 P.2d 500, 502 (App. 1987). Finding no waiver, the court explained that the insurer's "negotiation of the money order was quickly followed by a clear statement that it intended to apply the money toward a policy period commencing on the date of receipt of payment" which was after the accident happened. *Id.* at 82, 740 P.2d at 503. Here, the Hesses made no such clear statement

[4] In the absence of contrary authority, Arizona courts follow the Restatement of the Law. *Bank of America v. J. & S. Auto Repairs*, 143 Ariz. 416, 418, 694 P.2d 246, 248 (1985).

to the Bank of their intent to preserve their breach of contract claim at the time they requested and entered into the Third Contract, nor did the Hesses complain about the Bank's conduct to anyone else until the Bank turned them down for a second loan modification. In fact, the Hesses agreed to the express terms of the Third Contract that reaffirmed the Second Contract.

¶15 *United California Bank* is also distinguishable. There, a lender's unequivocal refusal to perform without first securing an in-fact first position lien, a position to which it had no right, constituted an anticipatory breach. 140 Ariz. at 280, 681 P.2d at 432. The lender argued that the borrower waived its right to sue for anticipatory breach because the borrower continued to perform on the contract and accepted an extension of time to fulfill its obligations. *Id.* at 280-82, 681 P.2d at 432-34. Finding no waiver, the court held that an innocent party confronted with anticipatory breach may continue to treat the contract as operable and continue to urge performance. *Id.* at 281, 681 P.2d at 433. The court further held that the lender's acceptance of an extension was not evidence of waiver because when the borrower accepted the extension, it expressly stated it did not acquiesce in the view that the lender was entitled to an in-fact first position lien. *Id.* at 283, 681 P.2d at 435. "This was not a relinquishment; it

was the preservation of a right." *Id.* In contrast, the Hesses did not explicitly preserve their breach of contract claim when they signed the Third Contract. Furthermore, the Hesses do not argue the Bank's actions constituted an anticipatory breach in which the Hesses could have still urged the Bank to perform. Here, after the Bank had allegedly breached the First Contract, the Hesses continued to perform and did nothing to preserve their right to sue the Bank at the time they entered into the Third Contract.

¶16 Given the facts, the Hesses' acceptance of the Third Contract can only be viewed as a relinquishment of the Hesses' right to claim that the Bank breached the First Contract two years before. Thus, the Hesses waived any right to assert a claim for breach of the First Contract.

II. SECOND CONTRACT

¶17 The Hesses claim that the Second Contract is voidable and not enforceable because they entered into it under duress. For the reasons stated above, this claim is also barred. Additionally, the claim fails as a matter of law because a contract entered into under duress may be ratified and become binding. *Hubbard v. Geare,* 77 Ariz. 262, 264, 269 P.2d 1064, 1065 (1954).

¶18 The facts in *Hubbard* are analogous to those here. In *Hubbard*, a tenant, in response to a landlord's threats, renewed his business lease despite wanting to move his establishment. *Id.* at 263, 269 P.2d at 1064-65. After learning that the landlord's threats were unfounded, the tenant continued to perform on the lease for eighteen months until he was able to secure a new location across the street. *Id.* at 264, 269 P.2d at 1065. When the tenant moved out, the landlord sued for breach of the lease and the tenant sought to void the lease on the basis of duress. *Id.* *Hubbard* explained that the power of avoidance for duress is lost if, after the duress has been removed, the injured party manifests to the other party an intention to affirm it. *Id.* at 264-65, 269 P.2d at 1065. In other words, one who seeks to void a contract executed under duress must act within a reasonably prompt time after the alleged duress occurred. *Id.* at 265, 269 P.2d at 1065-66. The tenant in *Hubbard* ratified the lease and rendered it enforceable when he decided to remain in possession of the premises for eighteen months after discovering that the landlord's threat was hollow, until he could, at his own convenience, establish his business elsewhere. *Id.*

¶19 The same result is warranted here. Even if the Hesses entered into the Second Contract under duress, they did nothing

for two years even though the threat of immediate foreclosure was over. Not only did they do nothing, but they sought, obtained, and entered into the Third Contract which modified and expressly reaffirmed the Second Contract. In doing so, they never mentioned the alleged duress. After executing the Third Contract, they again did nothing for the next two years, until the Bank rejected the Hesses' request for a second loan modification. Then, for the first time, the Hesses complained that the Second Contract was unenforceable because it was entered into under duress.

¶20 The Hesses lost any defense of duress because the evidence shows that they accepted the terms of the Second Contract and then ratified them when they entered into the Third

Contract.[5] The Hesses took no action for years after the claimed duress occurred. Moreover, the Hesses provided no excuse for the delay. *See Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 409 n.7 (9th Cir. 1992) (rejecting claim that a distributor agreement was not valid because it was entered into under duress where distributor accepted the benefits under the agreement for almost four years and presented no excuse for its delay in seeking rescission). As a matter of law, the Second Contract is enforceable.

[5] The Hesses offer no explanation why they should not be bound by the clear and express reaffirmations of the Second Contract contained in the Third Contract. They do not say that they did not read the Third Contract, just that they "never saw any language in the new contract, that [they] were affirming the validity of the prior loans," and that, "[i]t was never [their] intent to do so." Contrary to what the Hesses claim to have understood, the Third Contract explicitly renews and affirms the terms of the Second Contract: "Except as expressly changed by this Agreement, the terms of the original obligation . . . remain unchanged and in full force and effect." The Hesses' argument that their subjective intent preserved their breach of contract claim is irrelevant because a party's intent is determined by an objective standard. *See Spain*, 152 Ariz. at 194, 731 P.2d at 89; *see also Wippman*, 24 Ariz. App. at 525, 540 P.2d at 144. Moreover, self-serving, conclusory statements contained in an affidavit which are not otherwise supported in the record are not sufficient to avoid summary judgment. *Florez*, 185 Ariz. at 526, 917 P.2d at 255 ("Self-serving assertions without factual support in the record will not defeat a motion for summary judgment." (citation omitted)).

¶21 We award the Bank its attorneys' fees on appeal pursuant to the Second and Third Contracts upon the Bank's compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's entry of summary judgment in favor of the Bank.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
ANDREW W. GOULD, Judge